LOO SOO MOOI

v.

PROJEK PERTAMA JAYA SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[SUIT NO. C 1789 of 1984]
9 JULY 1985

CIVIL PROCEDURE: *Judgment in default of appearance - Application to set aside - Judgment regular - Affidavit of merits - Whether application should be allowed.*

Judgment in default was obtained by the plaintiff against the defendant. The defendant sought to set aside the judgment.

Held:
[1] There was a good service of the writ and therefore the judgment in default was a regular judgment. The affidavit in support of the application did not contain any defence on the merits.

[2] The annexed statement of defence was nothing but a bare denial and bare allegations. The defendant had failed to file an affidavit stating facts showing a defence on the merits.

[Application dismissed with costs.]

Case referred to:
Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat [1979] 1 MLJ 23

JUDGMENT

Zakaria Yatim J:

This is an application to set aside judgment in default of appearance entered against the defendant by the Senior Assistant Registrar.

The plaintiff's claim against the defendant is for a sum of RM184,734.74. In her statement of claim she averred that on 25 July 1983, she and the defendant entered into an oral agreement whereby the defendant agreed to award her certain construction works at a contract price of RM3,928,000. It was a term of the agreement that the plaintiff would pay the defendant ten percent commission on all progress claims. Pursuant to the agreement, the plaintiff commenced the construction works at the work site and paid the defendant ten percent commission of progress claims made. The plaintiff alleged that on 3 January 1983, the defendant committed a breach of the terms of the agreement and wrongly terminated the agreement. The plaintiff claims that she suffered loss and damages as a result of the wrongful termination of the agreement. She claimed against the defendant a sum of RM168,562.84 being the balance outstanding sum for the progress claims of completed works and a sum of RM16,171.90 being the costs of materials taken over by the defendant from the plaintiff at the site.

The writ was filed on 9 June 1984. It was served on the defendant on 21 June 1984. The memorandum of appearance, dated 12 July 1984 was filed on 18 July 1984. In the meantime the plaintiff filed a certificate of non-appearance on 4 July 1984 and obtained judgment in default of appearance on 7 July 1984.

The law governing an application to set aside judgment in default has been laid down by the Federal Court in *Bank Bumiputra Malaysia Bhd. v. Majlis Amanah Ra'ayat* [1979] 1 MLJ 23. In that case, Raja Azlan Shah Ag. CJ (Malaya), as he then was, in delivering the judgment of the Court said.

> The rule gives the Court a discretion which must be exercised judicially. It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits....

Counsel for the applicant, in his submission contended that the judgment in default of appearance dated 7 July 1984 was not a regular judgment. He claimed that the defendant only knew of the claim on 9 July 1984. In his affidavit in support of the application, the Managing Director of the defendant company admitted that the writ was served on the defendant's registered office at Room 102, 5A (1st. Floor), Jalan Travers, Brickfields, Kuala Lumpur. He stated, however, that the said address was the address of the company's Secretaries. In the defendant's statement of defence, it admitted para. 2 of the statement of claim which stated that the registered office of the defendant company was at Room 102, 5A (1st. Floor), Jalan Travers, Brickfields, Kuala Lumpur. This was in fact the address where the writ was served. In my opinion, the service was a good service and the judgment in default was a regular judgment.

The next point to consider is whether there is an affidavit of merits. The affidavit in support of the application does not contain any defence on the merits. Attached to the affidavit is a copy of the statement of defence and counter claim. The defence is nothing but a mere denial. In para. 6 of the defence, the defendant averred that the plaintiff failed to complete the works according to specifications, and the plaintiff delayed in the performance of the works. These are only bare allegations. The further affidavit of the defendant dated 22 January 1985, together with the documents exhibited thereto do not disclose any defence on the merits. The defendant has failed to file "an affidavit **stating facts** showing a defence on the merits."

In the circumstances, I dismiss the application with costs.

Also found at [1986] 1 CLJ 64